No. 22,747

IN THE

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

NATIONAL LABOR RELATIONS BOARD, Petitioner

v.

INTERNATIONAL LONGSHOREMEN'S AND WAREHOUSEMEN'S UNION; AND LOCAL 4, INTERNATIONAL LONGSHOREMEN'S AND WAREHOUSEMEN'S UNION, Respondent

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ON PETITION FOR ENFORCEMENT OF AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD

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BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD

JURISDICTION

This case is before the Court upon the petition of the National Labor Relations Board pursuant to Section 10(e) of the National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 29 U.S.C. Sec. 151, *et seq.*), for enforcement of its order issued against International Longshoremen's and Warehousemen's Union; and Local 4, ILWU (hereafter referred to as Longshoremen) on April 13, 1967.

The Board's decision and order in the unfair labor practice proceeding (R. 48, 43-45)[1] are reported at 163 NLRB No. 142. The Board's earlier decision and determination of dispute in the underlying Section 10(k) proceeding (R. 5-14) is reported at 158 NLRB 1024. This Court has jurisdiction of the matter, the unfair labor practices having occurred in Vancouver, Washington.

STATEMENT OF THE CASE

I. THE BOARD'S FINDINGS OF FACT

Briefly, the Board found that the Longshoremen engaged in conduct proscribed by Section 8(b)(4)(ii)(D) of the Act,[2] with an object of forcing or requiring Aluminum Company of America (hereafter referred to as the Company) to assign certain work in dispute—the unloading of the Company's cargo at its dock at Vancouver, Washington—to employees represented by the Longshoremen rather than to company employees represented by the Aluminum Trades Council of Vancouver, Washington, affiliated with the Aluminum Workers International Union and Local 300 (hereafter referred to as Aluminum Workers). The Board, in the earlier proceeding pursuant

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[1] References to the pleadings, decision and order of the Board, and other papers reproduced as "Volume I, Pleading," are designated "R". References to portions of the stenographic transcript of the underlying Section 10(k) proceeding are designated "Tr.", while portions of the transcript of the unfair labor practice hearing are designated "Tr., ULP." "EX", "LX", or "AX" refer to the exhibits of the Employer, the Longshoremen, and the Aluminum Workers, respectively. References preceding a semicolon are to the Board's findings; those following are to the supporting evidence.

[2] The pertinent statutory provisions are set forth *infra,* p. 24.

to Section 10(k) of the Act, determined that the Longshoremen were not entitled to perform the disputed work and rendered an affirmative award of the work to the employees represented by the Aluminum Workers.

A. The nature of the work in dispute

The Company is engaged in the manufacture of aluminum products at plants throughout the United States, including the Vancouver Works at Vancouver, Washington (R. 6, 33; Tr. 22). The Vancouver Works is a large smelter and aluminum casting and fabricating plant located on a tract of land adjacent to the north bank of the Columbia River—some 4 miles downstream from Vancouver, Washington, and Portland, Oregon (R. 7, 37; Tr. 22-23).

At its Vancouver Works the Company produces various kinds of semi-finished and finished aluminum products from alumina, a fine, powdery, difficult to handle, material obtained by refining bauxite ore (R. 7 fn. 3; Tr. 17, 78, 137-138, 149).

From 1940 to 1965, alumina had been shipped to the Vancouver Works exclusively by railroad boxcars from company owned refining plants in Louisiana and Texas (R. 7, 37; Tr. 31).[3] For the last 18 of those 25 years, the alumina was unloaded from the boxcars and transported to and from storage areas and finishing mills by Aluminum Workers—the exclusive certified representative of the production and maintenance employees at the Vancouver Works since 1947

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[3]For a short time during a 1948 flood, alumina was brought to the Vancouver Works by barge from the Port of Vancouver, and was unloaded by company production employees, using a bucket crane (R. 7 fn. 4; Tr. 31-32).

(R. 6-7, 37; Tr. 23-24, 30). Longshoremen has no contract with the Company and has never represented company employees (R. 7, 12; Tr. 31).

In October 1965, the Company began receiving most of its alumina by vessel directly from its new refining facilities at Surinam, South America, while continuing to receive alumina in reduced quantities by railroad boxcar (R. 7-8, 37; Tr. 32, 52). To unload the vessels, the existing conveyor system was simply extended from the boxcar unloading shed to a hopper located on a piling in the Columbia River (R. 8; Tr. 60, 66-67, 145-146). Mooring buoys were also constructed to secure the vessel during discharge of the ship (R. 8; Tr. 66-67).

Whereas alumina is pulled from the boxcars by air equipment, the ship is unloaded by the use of a clam-shell bucket operated by a crane, which scoops the ore out of the hold of the vessel and deposits it into the hopper (R. 7-8; Tr. 63-65). Ordinarily a bulldozer must be used to move some alumina from the corners of the hold to within reach of the crane (Tr. 80).

When the alumina is delivered by ship, the alumina flows onto the extended conveyor belt from the hopper, then moves through the boxcar unloading shed and blends with alumina being unloaded from boxcars (Tr. 139, 146, 148). Whether a boxcar or ship delivery is involved, alumina is next deposited in storage tanks. From the storage tanks, the alumina is discharged into buckets which are transported by overhead cranes to hoppers from which it is fed into electrolytic cells, called "pots", for processing (R. 7; Tr. 139). These

facilities are owned by the Company and are used exclusively for alumina unloading (R. 8, 11; Tr. 36-37, 60).[4]

Only one ship was used for alumina delivery at the time of the Section 10(k) hearing, the SS *Lysland*, which is leased by the Company and carries only company-owned bulk alumina (R. 8, 11; Tr. 32. 36, 37).[5] The round-trip between Surinam and Vancouver takes approximately 45 days, and upon arrival, eight or nine times a year, the ship is unloaded by a crew comprising an ore craneman-transferman, two ore transfermen, and a laborer (R. 8; Tr. 35).

Altogether 16 company employees do the unloading work as 4 shifts are necessary to ensure seven-day a week, around the clock unloading of the ship. (R. 8; Tr. 94-95, 144-145). These employees also unload railroad boxcars, and are regularly employed in the production and maintenance unit represented by Aluminum Workers. Throughout the Vancouver Works, alumina is commonly moved from place to place by employees using cranes and conveyors, and in performing such plant tasks substantially the same skills are required as those involved in unloading the *Lysland* (R. 8, 12; Tr. 142, 148-149, 202). Thus, when the *Lysland* is not in port or cannot be unloaded because of difficulties with the unloading equipment, com-

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[4]These unloading facilities were to be superseded in 1967 by a dock with a shore-based gantry-type crane which would scoop alumina from the holds of the vessel and run on rails from the ship to the starting point of the conveyer (R. 8; Tr. 140-141).

[5]However, it was contemplated that more than one ship would be leased by the Company, and in fact since then one other ship has been used, the SS *Raold Jarl* (R. 41-42; Tr. 81, Tr. ULP 33-35).

pany employees can work elsewhere in the plant (R. 8, 12; Tr. 150, 202).

The Company's employees required little special training, and have performed their duties satisfactorily (R. 12; Tr. 151-152). Nevertheless, if the work is assigned to Longshoremen, it would be performed by persons who are not regular company employees, and company officials contemplate a reduction in force of employees represented by the Aluminum Workers (R. 11-12; Tr. 47, 153).

B. Longshoremen pressure company officials to assign the disputed work to its members

In late September 1965, shortly before the first scheduled arrival of the SS *Lysland* at Vancouver, Longshoremen International Representative James Fantz telephoned Vancouver Operations Manager Rudolph Anderson, and asked for an appointment. Anderson agreed to see Fantz and the two men met at a company office on September 30, 1965 (R. 8, 37-38; Tr. 37, 277-278).[6]

The Longshoremen representative told Anderson that he had heard about an incoming shipload of alumina, and wanted to notify the Company that Longshoremen had men available for unloading (R. 8, 38, 41; Tr. 38, 280-281). In response, Anderson advised Fantz that as company employees had been unloading alumina for 25 years, the Company felt obliged to give consideration to its employees represented by Aluminum Workers (R. 41; Tr. 38-39, 283-284). The

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[6] Also attending the meeting were Edward D. Andrew, representative of Longshoremen's Local # 4, George Stout, production manager of the Vancouver operation, and George Case, labor relations and personnel supervisor at the Vancouver Works (R. 38; Tr. 38).

parties then discussed the Company's desire to have the ships unloaded on a 24-hour-a-day basis. Fantz felt around-the-clock work could be arranged, but told the company officials that Longshoremen working after 3 o'clock each afternoon would have to be paid at overtime rates (R. 38; Tr. 40, 281).

In the course of the conversation, Fantz referred to "the difficulty" his union was having with Harvey Aluminum Company (R. 8, 38, 41; Tr. 284, 39). At the time, Harvey Aluminum, a neighboring competitor of the Company, was being picketed by Longshoremen over the same type of disputed work assignment. Company officials were aware of "the difficulty" the Longshoremen were having with Harvey (R. 38; Tr. 39). The conference ended when Anderson informed Fantz that the Company felt the work rightfully belonged to Aluminum Workers, but that the Company would review the matter in light of Longshoremen's request (R. 38; Tr. 41).

After conferring with Aluminum Workers officials, and being advised of their belief that the disputed work was covered by the terms of the parties' collective bargaining agreement, as well as that Union's resolve to enforce the agreement, Anderson phoned Fantz and arranged for a meeting on October 19, 1965 (R. 38; Tr. 41-43). At this meeting were Fantz, for the Longshoremen, and Stout, Case, and Anderson for the Company (R. 38; Tr. 43).

Longshoremen representative Fantz immediately "requested a specific answer because of the shortness of time between [today] and the day the ship [is] to arrive," and "informed them that we again want to emphasize the fact that we consider this Longshore work—work that we should do" (R. 38; Tr. 289). Anderson indi-

cated that the Company had decided to use its own plant and people, and indicated the basis of the Company's decision (R. 38-39; Tr. 44). To this Fantz responded, "[O]ur union [will] use whatever methods we [find] at our disposal to try to keep work that we consider [is] properly ours" (R. 38, 40-41; Tr. 291-292). The company official answered by reminding Fantz that the Company had previously enjoyed friendly relations with the Longshoremen; in fact the Company had shipped aluminum products out of the docks at Vancouver or Portland for 20 years. In 1964, Anderson reminded Fantz, the Company had shipped something like 30,000 tons over those docks with the Longshoremen doing all the longshore work (R. 40; Tr. 46). When Anderson then expressed the Company's hope of continuing these good relations, the union representative replied: "I will be very frank with you. If this work is given to the Aluminum Workers, it will disrupt the harmonious relationship with us and you can expect trouble in other areas" (R. 9, 39, 41; Tr. 46-47, 158). Anderson asked what Fantz meant by "other areas," and whether he was referring to the Port of Vancouver (R. 39; Tr. 47, 158).[7] Fantz answered in the affirmative, and stated that, "things could happen to the Company's cargo and the Company could have trouble shipping" (R. 9, 39, 41; Tr. 47, 158). Following this meeting, the SS *Lysland* delivered its cargo to the Company's dock, but returned to Surinam empty (R. 41; Tr., ULP 38).

In the early part of December, before the second scheduled arrival of the *Lysland,* Company officials arranged for another talk

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[7]The Company uses the facilities of the Port of Vancouver to ship large quantities of its finished products (R. 39; Tr. 46-47).

with union representative Fantz (R. 39; Tr. 50). At this final meeting, Operations Manager Anderson told the Longshoremen representatives of the Company's plan to load out a thousand tons of Cryolite, boxed in plywood containers each weighing 5,000 pounds, and ship it to Surinam on the next return voyage of the *Lysland* (R. 39; Tr. 50). Anderson indicated that the Company planned to ship this material by boxcar to the Port of Vancouver, and have Longshoremen then load the boxed material aboard the *Lysland* (R. 39; Tr. 50-51). Anderson explained that he wanted to know about a rumor that the *Lysland* had been declared "hot" by the Longshoremen, as the Company did not want to send a thousand tons of material to Vancouver only to find out that Longshoremen would not load the cargo (R. 39; Tr. 50-51). Union official Fantz replied that the Longshoremen ". . . would not load the *Lysland* on this trip" (R. 9, 41-42; Tr. 51, 158-159). Then Fantz said that the ship was "blacklisted," and when asked to explain, stated that the Longshoremen would not "work the ship" (R. 42; Tr. 51).

Subsequent to this meeting between the parties, the *Lysland* made trips from Surinam to the Company's facilities at the Vancouver Works on three or four occasions. Each time the ship returned to Surinam without cargo (R. 41; Tr., ULP 37).

C. The Company files unfair labor practice charges and the Section 10(k) proceeding is held

The Company filed a charge with the Board on October 20, 1965, alleging that the Longshoremen were violating Section 8(b)(4)(ii)(D) of the Act. After a hearing, the Board issued its Decision and Determination of Dispute on May 20, 1966, holding that the

employees of the Company represented by Aluminum Workers were entitled to continue to perform the work of unloading alumina from the *Lysland* when it docked at the Vancouver Works. Accordingly, the Board also found that the Longshoremen were not lawfully entitled to force the Company to assign the disputed work to workers represented by it. The Board directed the Longshoremen to notify the Regional Director within 10 days whether it would comply with the Board's determinations. Such notification was never received.

Subsequently, on September 6, 1966, the General Counsel issued a complaint against the Longshoremen alleging a violation of Section 8(b)(4)(ii)(D) of the Act. The Longshoremen's answer to the complaint admitted the failure to notify the Regional Director and indicated that the Local did not intend to comply (R. 34). A hearing was held before a Trial Examiner on November 3, 1966. At that hearing, the parties stipulated that the record of the Section 10(k) proceeding be received into the record of the unfair labor practice proceeding (R. 36).

II. THE BOARD'S CONCLUSIONS AND ORDER

In agreement with the Trial Examiner, the Board concluded that Longshoremen violated Section 8(b)(4)(ii)(D) of the Act by threatening to refuse to perform work and by coercing and restraining the Company, with an object of forcing or requiring the Company to assign the work of unloading alumina from the *Lysland* at the Vancouver Works to workers represented by Longshoremen rather than to company employees represented by Aluminum Workers. The Board's order requires Longshoremen to cease and desist from engag-

ing in the foregoing violations of Section 8(b)(4)(ii)(D) of the Act and to post appropriate notices.

ARGUMENT

THE BOARD PROPERLY FOUND THAT THE UNION VIOLATED SECTION 8(b)(4)(ii)(D) OF THE ACT

A. Introduction—The Statutory Framework

Section 8(b)(4)(ii)(D) of the Act, in relevant part, makes it an unfair labor practice for a labor organization or its agents:

> (ii) to threaten, coerce, or restrain any person engaged in commerce or in an industry affecting commerce, where in either case an object thereof is:
>
> * * *
>
> (D) forcing or requiring any employer to assign particular work to employees in a particular trade, craft, or class rather than to employees in another labor organization or in another trade, craft, or class, unless such employer is failing to conform to an order or certification of the Board determining the bargaining representative for employees performing such work:
>
> * * *

Section 8(b)(4)(D) is supplemented by Section 10(k) which provides:

> Whenever it is charged that any person has engaged in an unfair labor practice within the meaning of paragraph (4)(D) of section 8(b), the Board is empowered and directed to hear and determine the dispute out of which such unfair labor practice shall have arisen, unless, within ten days after notice that such charge has been filed, the parties to such dispute submit to the Board satisfactory evidence that they have adjusted, or agreed upon methods for the voluntary adjustment of, the dispute. Upon compliance by the

> parties to the dispute with the decision of the Board or upon such voluntary adjustment of the dispute, such charge shall be dismissed.[8]

These sections render unlawful threats, restraints, and other coercive conduct aimed at forcing the reassignment to employees in one labor organization of work already assigned to members of another labor organization. Thus, a violation of Section 8(b)(4)(ii)(D) presumes two elements: (1) the labor organization must "threaten, coerce or restrain" any person engaged in commerce; and (2) an object of this conduct must be to force an employer to reassign work from employees in one labor organization to those in another.

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[8] Accordingly, where, as here, a Section 8(b)(4)(D) charge is filed and the parties to the underlying work dispute do not adjust or agree to adjust the dispute voluntarily, proceedings on the unfair labor practice charge are held in abeyance while the Board hears and determines the work dispute pursuant to Section 10(k). If the Board awards the disputed work to a union other than the one against which the charge was filed, and the latter union does not agree to comply with the Board's determination, the unfair labor practice case proceeds, culminating in a Board decision and order subject to court review. Since the Act provides no independent review of the Board's Section 10(k) work assignment, the only stage at which the losing party in that proceeding can challenge the Board's work award is in conjunction with judicial review of the Board's subsequent Section 8(b)(4)(D) unfair labor practice finding. *N.L.R.B. v. International Longshoremen's & Warehousemen's Union (United States Steel Corp.)*, 378 F.2d 33, 35-36 (C.A. 9), cert. denied, 389 U.S. 1004.

B. Substantial Evidence Supports the Board's Conclusion that Respondent Threatened, Restrained, and Coerced the Company for an Object Proscribed by Section 8(b)(4)(ii)(D) of the Act

On the facts found by the Board, there can be no question but that Longshoremen officials illegally threatened the Company with labor trouble if Longshoremen were not given the work already assigned to employees represented by the Aluminum Workers. Nor is there any real question but that these coercive threats in fact restrained the Company's pursuit of its legitimate business interests.

Thus, after Longshoremen representative Fantz learned that a shipload of alumina would soon be arriving at the Company's private dock, he arranged a meeting with company officials. As the record indicates, he told the Company that Longshoremen had men available to perform unloading tasks, and when company official Anderson indicated that the Company felt obligated to also consider employees represented by Aluminum Workers, who had been performing unloading tasks at the Company for the past 25 years, the Longshoremen representative called attention to the similar "difficulty" that his union was having with Harvey Aluminum (Tr. 284). Since Longshoremen and Harvey Aluminum were at that time embroiled in a similar dispute, with Longshoremen picketing that firm, the implication that the same treatment lay in store for the Company was readily apparent in Fantz' remark.

Longshoremen representative Fantz maintained this same attitude at the second meeting between the parties, held shortly before the alumina-bearing *Lysland* was scheduled to arrive. Fantz opened the meeting by declaring that the work of unloading alumina from

ships belonged to Longshoremen, and advised the Company that "Our Union would use whatever methods we found at our disposal to try to keep work that we considered was properly ours" (Tr. 291-292). Company official Anderson then informed Fantz that management had concluded the work properly belonged to present company employees represented by Aluminum Workers. He explained the Company's fears that a decision in favor of Longshoremen would not only violate the Company's contract with Aluminum Workers, but might well result in the discharge of some company employees. But, Fantz remained adamant in his demand for the work. He told the Company that he would be very frank: if the Company did not change its mind but assigned this work to the Aluminum Workers, the Company "could expect trouble in various areas" (Tr. 46-47, 158). Asked by Anderson to be more specific, and whether he was referring to the port of Vancouver, Fantz suggested that "things could happen to the Company's cargo" at Vancouver and "the Company could have trouble shipping" (Tr. 47, 158).

In early December, the Company decided to ship a thousand tons of Cryolite to Surinam on the next return voyage of the *Lysland*. Fearing economic damage if the Company delivered the Cryolite to the dock at Vancouver, and the Longshoremen then refused to load it, Anderson arranged a third meeting with Fantz. At this meeting, Anderson informed Fantz of the Company's intention and asked him whether there might be "trouble" (Tr. 50-51). Fantz confirmed that the Longshoremen ". . . would not load the *Lysland* on this trip" (Tr. 51, 158-159). He elaborated, referring to the *Lysland* as "blacklisted" and stated that Longshoremen would not "work

the ship" (Tr. 51). The Cryolite was not shipped and the *Lysland* returned empty to Surinam.

On the facts shown, it is plain that Fantz' threats of labor trouble, aimed at forcing the Company's assignment of the disputed work to Longshoremen, constituted conduct proscribed by Section 8(b)(4)(ii)(D). This Court and others, have consistently held that threats to picket constitute "threats, restraint and coercion" within the meaning of Section 8(b)(4). *N.L.R.B. v. District Council of Painters # 48,* 340 F.2d 107, 111 (C.A. 9), cert. denied, 381 U.S. 914; *N.L.R.B. v. Local 825, Operating Engineers,* 315 F.2d 695, 697-698 (C.A. 3); *N.L.R.B. v. Local 254, Building Service Employees International Union,* 359 F.2d 289, 291 (C.A. 1).[9] And it is settled law that threatening a strike or work stoppage constitutes a violation of Section 8(b)(4)(ii)(D) where, as here, it is done for the object of forcing the reassignment to employees in one labor organization of work already assigned to members of another labor organization. *N.L.R.B. v. Local 676, International Brotherhood of Teamsters, etc.,* 376 F.2d 3, 4 (C.A. 3); *N.L.R.B. v. Denver Photo Engravers Union No. 18,* 351 F.2d 67, 70-71 (C.A. 10); *N.L.R.B. v. Local Union No. 3, International Brotherhood of Electrical Workers, etc.,* 339 F.2d 145, 146-147 (C.A. 2); *New Orleans Typographical Union No. 17 v. N.L.R.B.,* 368 F.2d 755, 762 (C.A. 5); *N.L.R.B. v. Local 25, International Brotherhood of Electrical Workers, etc.,* 383 F.2d 449, 452-453 (C.A. 2).

[9]The legislative history of this provision discloses that by use of the term "threaten, coerce or restrain," Congress intended to foreclose threats against employers of "labor trouble or other consequences" as well as prohibit the carrying out of such threats by means of a "strike or other economic retaliation." II Leg. Hist. 1568(2); 1750(1); 1523(1); 1581(1).

C. The Board's Determination in the Section 10(k) Proceeding that Employees Represented by the Aluminum Workers Are Entitled To Perform the Work in Dispute Is Neither Arbitrary Nor Capricious

In *N.L.R.B. v. Radio and Television Broadcast Engineers,* 364 U.S. 573, 583 (commonly referred to as the *CBS* case), the Supreme Court held that Section 10(k) of the Act requires the Board to determine the merits of jurisdictional disputes by affirmatively deciding which group of employees is entitled to the disputed work on the basis of all relevant factors. The Court recognized that its holding would force the Board to exercise "powers which are broad and lacking in rigid standards to govern their application." 364 U.S. at 583. Because of the Board's "long experience in hearing and disposing of similar problems" and its "knowledge of the standards generally used by arbitrators, unions, employers, joint boards, and others in wrestling with this problem," the Court expressed confidence in the capacity of the Board to meet its responsibilities. *Ibid.*[10]

In *International Association of Machinists, Lodge 1743 (Jones Construction Co.),* 135 NLRB 1402 (cited with approval, *N.L.R.B. v. Local 825, International Union of Operating Engineers,* 326 F.2d 213, 217 (C.A.3)), a case coming to the Board soon after the *CBS* decision, the Board outlined its approach to this area (135 NLRB 1410-1411):

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[10]The Court said further that "administrative agencies are frequently given rather loosely defined powers to cope with problems as difficult as those posed by jurisdictional disputes and strikes. It might have been better, as some persuasively argued in Congress, to intrust this matter to arbitrators. But Congress, after discussion and consideration, decided to intrust this decision to the Board." 364 U.S. at 583.

> At this beginning stage in making jurisdictional awards as required by the Court, the Board cannot and will not formulate general rules for making them. Each case will have to be decided on its own facts. The Board will consider all relevant factors in determining who is entitled to the work in dispute, e.g., the skills and work involved, certifications by the Board, company and industry practice, agreements between unions and between employers and unions, awards of arbitrators, joint boards and the AFL-CIO in the same or related cases, the assignment made by the employer, and the efficient operation of the employer's business. This list of factors is not meant to be exclusive, but is by way of illustration.

As such Section 10(k) determinations have come before the courts of appeals for review, the governing standard has necessarily been whether the Board has abused its discretion—that is, whether the Board has been arbitrary or capricious—in making a particular work assignment. Because the Board has a broad statutory mandate to apply its expert judgment flexibly, courts have uniformly recognized the limited scope of judicial review of the Board's award in such matters. *N.L.R.B. v. International Longshoremen's & Warehousemen's Union (United States Steel Corp.), supra,* at 35-36 (C.A. 9). Accord: *N.L.R.B. v. Local 825, International Union of Operating Engineers, supra,* 326 F.2d at 217 (C.A. 3); *N.L.R.B. v. St. Louis Printing Pressmen and Assistants Union No. 6, Inc.,* 385 F.2d 956, 960 (C.A. 8); *N.L.R.B. v. Local 676, International Brotherhood of Teamsters, etc., supra,* 376 F.2d at 5 (C.A. 3); *New Orleans Typographical Union v. N.L.R.B., supra,* 368 F.2d at 761-765 (C.A. 5).

As we now show, the Board gave careful consideration in the Section 10(k) proceeding to all relevant factors in determining which of the two competing groups of employees was entitled to the dis-

puted work. The Board's decision, awarding the work of unloading the *Lysland* at Vancouver to employees represented by Aluminum Workers, is reasonable and within the area of discretion entrusted to it by the Act.

As the Board noted, the factors relied upon in making its determination in the case at bar are virtually the same as those present in *NLRB v. International Longshoremen's and Warehousemen's Union, supra* (R. 11).

Here, as the Board pointed out, Longshoremen has never had a contract with the Company, nor is it the certified representative of any of the Company's employees. Aluminum Workers is the certified representative of the Company's production and maintenance employees and has had a continuing contract relationship with the Company since 1947. Although Aluminum Workers' certification and contract does not specifically cover the work of unloading ships, jobs which came into existence after the certification was issued, the job descriptions with respect to the disputed work are substantially identical with those of regular jobs included in the regular production and maintenance unit (R. 10-12; Tr. 30, 162-163, EX. 1). Further, the present contract has been interpreted by the parties to cover the work in dispute (R. 12, 8; Tr. 212).

The employees represented by Aluminum Workers have been doing the unloading work to the Company's satisfaction since the operation began. And, as the Board noted, "Award of the work to longshoremen would result in a loss of jobs by employees represented by [Aluminum Workers], whereas an award to the latter would not

entail a job loss to longshoremen because they have never performed this work" (R. 12).

Although longshoremen on the Pacific Coast are generally experienced in the unloading of ships with cranes, employees represented by Aluminum Workers regularly in the course of the plant's normal operations, convey and unload alumina from railroad cars with large overhead cranes. And while company employees are considered experienced in lifting the powdery alumina involved, as the Board noted, ". . . longshoremen who might be referred to the Employer may not be experienced in handling alumina" (R. 12).

Employment of Longshoremen for the unloading work would almost certainly decrease the efficiency and economy of the operation. Longshoremen would have to be transported to the job site to perform intermittent work of a limited nature. On the other hand, unloading ships complements the work of employees represented by Aluminum Workers who are permanently and regularly employed in loading, unloading and transporting aluminum throughout the Vancouver Works.[11]

Before the Board, Longshoremen argued that their constitution and traditional practice of unloading ships on the Pacific Coast support their claim to the disputed work. In the instant case, however, the employees are unloading only the Company's cargo at the Company's dock, a circumstance distinguishing this from normal long-

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[11] As the Board noted, the employment of longshoremen could result in other unnecessary costs to the Company, arising from the necessity of hiring extra supervisory personnel (R. 12; Tr. 251, 257-258), and from the payment of special overtime rates to longshoremen because of the Company's plans for unloading on a 24-hour a day schedule (R. 38; Tr. 174).

shoremen's work. Indeed, Longshoremen's collective-bargaining agreement with the Pacific Maritime Association, an organization of shipping and stevedoring companies, specifically exempts from coverage a non-member of PMA, such as the Company, who "has control over the cargo at its premises *or* on its vessel . . ." (emphasis ours) (R. 11 fn. 8; Tr. 237, 275, EX. 8, LX 3). Similarly the cases relied upon by Longshoremen before the Board[12] in support of its position are inapposite, as those cases involved the unloading of ships at commercial docks by shipping and stevedoring companies which were members of the PMA and thus had a contractual relationship with Longshoremen.

Before the Board, respondent also argued that because the Company leases its ships, and does not own them, this case is distinguishable from the *United States Steel* case, *supra.* In rejecting this argument, the Board stated, "Here, as there, the ship is at all times under the control of the Employer and carries only cargo owned by the Employer; and the work in dispute is at a dock also owned by the Employer and located on its premises" (R. 11). The Board also noted that the Longshoremen's contract with PMA fails to draw such a distinction, and would exempt the Company from coverage here, as well as in that case (R. 11 fn. 8).

In sum, therefore, we submit that as in *International Longshoremen's and Warehousemen's Union (United States Steel Corp.), supra,* the Board's determination represents a balanced and conscientious consideration of all factors presented and is neither arbitrary nor

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[12] *American Mail Line,* 144 NLRB 1432; *Albin Stevedore Co.,* 144 NLRB 1443; *Howard Terminal,* 147 NLRB 359.

capricious, but is, in fact, amply supported by the evidence. See *Local 1291, International Longshoremen's Association (United States Steel Corporation)*, 154 NLRB 1415, 151 NLRB 1, 2-6, enf'd *per curiam*, 375 F.2d 1011 (C.A. 3), cert. denied, 389 U.S. 930; *N.L.R.B. v. Local 676, International Brotherhood of Teamsters, etc., supra*, 376 F.2d at 5 (C.A. 3); *N.L.R.B. v. St. Louis Printing Pressmen and Assistants Union No. 6, Inc., supra*, 385 F.2d at 960-961 (C.A. 8); *N.L.R.B. v. Local 991, International Longshoremen's Assn.*, 332 F.2d 66, 70-71 (C.A. 5).

CONCLUSION

For the reasons stated, we respectfully submit that a decree should enter enforcing the Board's order in full.

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June 1968.

CERTIFICATE

The undersigned certifies that he has examined the provisions of Rules 18 and 19 of this Court and in his opinion the tendered brief conforms to all requirements.

MARCEL MALLET-PREVOST
Assistant General Counsel,
NATIONAL LABOR RELATIONS BOARD

APPENDIX A

Pursuant to Rule 18.2(f) of the Rules of the Court:

EXHIBITS AT 10(k) HEARING

BOARD'S EXHIBITS

No.	Identified	Received	Rejected
1	5	5	

ALUMINUM WORKERS' EXHIBITS

1	6	9	

EMPLOYER'S EXHIBITS

1	19	21	
2	24	29	
3	25	29	
4(a), (b), (c)	26	29	
5	105	107	
5(a)	131	131	
6	112	113	
7	145	149	
8	236	262	

ILWU EXHIBITS

1	19	21	
2	272	273	
3	276	276	

EXHIBITS AT ULP HEARING

GENERAL COUNSEL'S EXHIBITS

1(a) thru 1(h)	28	28	

JOINT EXHIBITS

1, 2, 3	29	29	

APPENDIX B

The relevant provisions of the National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 29 U.S.C., Sec. 151, *et seq.*) are as follows:

UNFAIR LABOR PRACTICES

Sec. 8(b) It shall be an unfair labor practice for a labor organization or its agents–

* * *

(4) . . . (ii) to threaten, coerce, or restrain any person engaged in commerce or in an industry affecting commerce, where in either case an object thereof is:

* * *

(D) forcing or requiring any employer to assign particular work to employees in a particular labor organization or in a particular trade, craft, or class rather than to employees in another labor organization or in another trade, craft, or class, unless such employer is failing to conform to an order or certification of the Board determining the bargaining representative for employees performing such work:

LIMITATIONS

Sec. 10(k) Whenever it is charged that any person has engaged in an unfair labor practice within the meaning of paragraph (4)(D) of section 8(b), the Board is empowered and directed to hear and determine the dispute out of which such unfair labor practice shall have arisen, unless, within ten days after notice that such charge has been filed, the parties to such dispute submit to the Board satisfactory evidence that they have adjusted, or agreed upon methods for the voluntary adjustment of, the dispute. Upon compliance by the parties to the dispute with the decision of the Board or upon such voluntary adjustment of the dispute, such charge shall be dismissed.